ORISSA HIGH COURT : CUTTACK

W. P.(C) NO. 14758 OF 2008

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Renubala Mohanty ..... Petitioner

-Versus-

State of Orissa and others. ..... Opp. Parties

For Petitioner : M/s. S.D.Das,
H.S.Satpathy, D.R.Bhokta,
N.Bisoi, M.Panda,
D.Mohanty & A.N.Sahu.

For Opp. Parties : Addl. Government Advocate
(For opp. Parties 1 and 3)

M/s. S.K.Mishra,
M.R.Dash, S.K.Samantaray &
A.Kejariwal
(For Caveator)

Decided on 21.08.2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. DAS, J. The petitioner and opposite party no. 2 were contesting the election for the office of Sarpanch, Abadan Grama Panchayat under Kakatpur Panchayat Samity in the district of Puri. The said seat was a reserved seat for OBC category. The petitioner having obtained highest number of votes was declared elected to the office of Sarpanch of the said Grama Panchayat. The opp. Party no. 2 filed an election petition, being Election Misc.

Case No. 16 of 2007 before the learned Civil Judge (Junior Division), Nimapara challenging the election of the petitioner solely on the ground that the nomination paper of the petitioner should have been rejected as the petitioner does not belong to OBC category.

2. The opp. Parties 2 and 3 pleaded that the caste of the father of the petitioner has been recorded as "Dakua Paika." But the petitioner on obtaining a caste certificate that she belongs to the caste of "Paika" filed her nomination paper. It was, therefore, pleaded by them that the said certificate was obtained by the petitioner fraudulently from the Tahasildar. In the written statement of the petitioner, she pleaded that she has been issued with the said certificate by the Tahasildar in the year 2006, wherein it has been mentioned that she is "Paika" by caste. She further pleaded that the Election Tribunal cannot sit in appeal over the caste certificate, as the "Dakua Paika" and "Paika" are the same caste.

3. The caste certificate issued in favour of the petitioner that she belongs to "Paika" by caste was under challenge in appeal before the Sub-Collector, Puri, which ultimately came up before this Court in W.P. (C) No. 3404 of 2008. The said writ petition was disposed of by this Court on 30.6.2008 with the following order:-

"Heard learned counsel for the petitioner, learned Additional Standing Counsel for the State and Mrt. S.K.Mishra, learned counsel for opp. Party no.1.

By means of this writ petition, the petitioner has prayed for quashing of the order dated 7.1.2008 passed by the Tahasildar, Kakatpur cancelling the caste certificate issued in favour of the petitioner and the order dated 23.2.2008 passed by the Sub-Collector, Puri in Misc. (A) No. 9 of 2008 disposing of the appeal filed by the petitioner against the aforesaid order of the Tahasildar holding that he does not want to interfere in the order of the Tahasildar, Kakatpur, basing on records.

The Hon'ble Apex Court in Kumari Madhuri Patil v. Additional Commissioner, Tribal Development, AIR 1995 SC 94 inter alia directed that all the State Governments shall constitute a Committee of three officers, namely, (i) an Additional or Joint Secretary or any officer higher in rank of the Director of the concerned department (ii) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may**,** and (iii) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates to consider the genuineness or otherwise of the caste certificates issued. Learned Additional Government has submitted that the State Government has constituted a Committee headed by the Director, SC and ST Development Department to examine the genuineness or otherwise of the caste certificates issued.

We, therefore, quash the impugned orders passed by the Tahasildar as well as the Sub-Collector and remit the matter to the Tahasildar concerned to deal with the same keeping in mind the directions issued by the Hon'ble apex Court in Madhuri Patil case (supra) and the fact that the State Government has constituted a Committee pursuant to the direction issued by the Hon'ble apex Court. However, we make it clear that issuance of caste certificate or cancellation of the same will not affect the proceeding pending before the Court of Election Petition and it will be open for the Court concerned to decide the Election Petition on the basis of the evidence adduced before it.

The writ petition is disposed of accordingly".

From the above, it transpires that when the election petition was heard, the genuinity or otherwise of the caste certificate issued by the Tahasildar in favour of the petitioner was still subjudice before the Tahasildar/Sub-Collector. Nothing has been brought before this Court in the present writ petition to show that the said proceeding has come to an end. At this stage, therefore, it cannot be construed that the caste certificate was obtained fraudulently by the writ petitioner.

4. The sole question raised, therefore, to be decided in the election dispute was that whether the petitioner belongs to O.B.C. Category or not. The Election Tribunal after hearing the election dispute by his judgment dated 30.7.2008 allowed the election petition declaring the election of the writ petitioner as void and further declaring the opp. Party no. 2 as the elected Sarpanch of the Grama Panchayat. The petitioner preferred Election Appeal No. 7 of 2008 before the learned District Judge, Puri, who by his judgment dated 3.10.2008 confirmed the judgment of the Election Tribunal. Being aggrieved, the petitioner has approached this Court in the present writ petition for appropriate relief.

5. Mr. S.D. Das, learned senior counsel appearing for the petitioner contended that both the courts below under a wrong notion and misconception , applying the ratio of the decision in

the case of ***State of Maharashtra v. Millind and others,*** AIR 2001 SC 393 came to the conclusion that the caste of the father of the petitioner having been recorded as "Dakua Paika", the petitioner also belongs to the same caste , i.e., "Dakua Paika" and "Dakua Paika" does not find place in Ext. 15, which is a list of Socially and Educationally Backward Classes issued by the Minorities and Backward Classes Welfare Department. As such, the petitioner cannot be construed to be belonging to OBC.

6. The learned Election Tribunal though framed several issues in the election dispute, while answering the issues as to whether the writ petitioner is a member of the OBC community, has mis-directed itself in framing the said issue as "whether opp. Party no. 1 (writ petitioner) is a member of the OBC community inconformity with the Presidential Notification". On such erroneous approach that the persons belonging to OBC are mentioned in the Presidential Notification, the Election Tribunal while coming to a finding of fact that the petitioner belongs to the caste "Dakua Paika" applying the law as laid down in the case of *State of Maharashtra v. Milind and others* (supra) came to the conclusion that the petitioner being "Dakua Paika" by caste, she cannot claim to be a "Paika" and the Presidential Notification (Ext. 15) does not contain any caste as "Paika" or "Dakua Paika" as a member of OBC community. On the above finding, the Election

Tribunal concluded that the petitioner does not belong to OBC community. The learned appellate court in appeal also fell into the same error, while coming to the conclusion that in the notification under Ext. 15, there is no entry as "Dakua Paika" though the same contains the caste "Paika" and "Chasa Paika". The appellate court also referred to various case laws, but ultimately referring to the case of *State of Maharashtra v. Milind and others* (supra), confirmed the judgment of the learned Election Tribunal.

7. Be it mentioned here that all the decisions referred to by the courts below are in relation to adjudication of the question as to whether a person belongs to Scheduled Caste or Scheduled Tribe. None of the said decisions referred are in respect of OBC.

8. In the case of *State of Maharashtra v. Milind and others* (supra), the Supreme Court, while considering the question as to whether, at all, it is permissible to hold any enquiry and let in evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned Entry in the Constitution (Scheduled Tribes) Order, 1950, laid down that the plain language and clear terms of Articles 341, 342 show (1) the President under

Clause (1) of the said Article may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union Territory as the case may be; (2) Under Clause (2) of the said Articles, a notification issued under Clause (1) cannot be varied by any subsequent notification except by law made by Parliament. The object of Clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be within the meaning of the entries contained in the Presidential Orders issued under Clause (1) of Articles 341 and 342 is to be determined looking to them as they are. Clause (2) of the said Articles does not permit any one to seek modification of the said orders by leading evidence that the caste/tribe (A) alone is mentioned in the order but caste/tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only the Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the Entries in the Schedules pertaining to each State

whenever one caste/tribe has another name it is so mentioned in the brackets after it in the Schedules. In this view, it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Schedule Caste/Scheduled Tribe for the purpose of Constitution, even though, it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said Articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament. Hence, it is not possible to say that State Governments or any other authority or courts or tribunals are vested with any power to modify or vary said Orders. If that be so, no enquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential orders except as in clause (2) of Articles 341 and 342 would be futile holding any enquiry or letting in any evidence in that regard is neither permissible nor useful. It is thus clear that no enquiry at all is permissible and no evidence can be let in, to find out and decide that if any tribe or tribal community or part of or group within any tribe or tribal community is included within the scope and meaning of the concerned Entry in the Presidential order when it is not expressly or specifically included.

9. In that context, the Supreme Court further laid down that the power of the High Court would be much more restricted while exercising jurisdiction under Article 227 and dealing with the question as to whether a particular caste or tribe would come within the purview of the notified Presidential Order considering the language of Articles 341 and 342 of the Constitution.

10. OBCs are not included in the Presidential Order, 1950, but are governed under Clause (4) of Article 15 of the Constitution, which provides as follows:-

> "Article 15 (1) to (3) xxx xxx
>
> (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

11. In the case of ***State of Andhra Pradesh and another v. P. Sagar,*** AIR 1968 SC 1379, the Supreme Court was considering the validity of a fresh list prepared by the Government of Andhra Pradesh for determination of backward classes which was held to be unsustainable by the High Court of Andhra Pradesh. The Supreme Court, while confirming the judgment of the High Court, held that the fresh list was liable to be struck down for, whether the Government applied correct criteria while determining the backward classes was not a matter, on which any

assumption can be made especially when the list prepared was ex-facie based on castes or communities and was substantially similar to the list previously struck down. It further laid down that the expression "class" in Article 15 (4) means a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. The Parliament has by enacting Clause (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to Clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement. Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The

criterion for determining the backwardness must not be based solely on religion, race, caste, sex , or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. (AIR 1963 SC 649, AIR 1964 SC 1823 and AIR 1968 SC 1012) Foll. *(emphasis supplied)*

12. Recently, the Supreme Court in the case of ***Ashoka Kumar Thakur v. Union of India and others,*** (2008) 6 SCC 1 was in seisin of the case in which, the vires of the Central Educational Institutions (Reservation in Admission) Act, 2003 (5 of 2007) was challenged. Referring to various earlier decisions, it has been held that in the Constitution for the purposes of both Articles 15 and 16, caste is not synonymous with class and this is clear from paras - 782 and 783 of Indra Sawhney case. However, when creamy layer is excluded from the caste, the same becomes an identifiable class for the purpose of Articles 15 and 16. The Supreme Court has further held as follows:-

> "The National Commission for Backward Classes Act, 1993 in order to be wholly functional mandates determination by the Central Government of the backward classes for whom the statute is intended. Undisputedly, such determination has not been done. The plea of the respondents is that for more than half a century enough attention has not been given for the benefit of the Other Backward Classes in the matter of admissions to higher educational institutions. That cannot be a ground to act with hurry and with undetermined data. It may be as rightly contended by the respondents that

> the percentage can certainly be not less than 27%. But that is no answer to the important question as to the identity test.
>
> The Constitution of India is not intended to be static. It is by its very nature dynamic. It is a living and organic thing. It is an instrument which has greatest value to be construed. *Ut res valeat Potius quam pereat* (the construction should be preferred which makes the machinery workable). Our Constitution reflects the beliefs and political aspirations of those who had framed it. It is, therefore, desirable that while considering the question as to whether 27% fixed for the Other Backward Classes is to be maintained without definite data the rights of those who belong to the unfortunate categories of other economic backward classes deserve to be considered, else there shall be no definite determination of number of Other Backward Classes. While fixing the measure for creamy layer it would not be difficult also to fix the norms for the socially and economically backward classes, rather the latter exercise would be easier to undertake.
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> There has to be proper identification of Other Backward Classes (OBCs). For identifying backward classes, the Commission set up pursuant to the directions of the Supreme Court in Indra Sawhney case, 1992 Supp.(3) SCC 217, has to work more effectively and not merely decide applications for inclusion or exclusion of castes. A notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories."

The Supreme Court ultimately held in the said case (*Ashoka Kumar Thakur (*supra)) *that* Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2 (g) of Act 5 of 2007 being clarified as follows: If the determination

of “Other Backward Classes” by the Central Government is with reference to a caste, it shall exclude the “creamy layer” among such caste.

13. Applying the ratio of the aforesaid decision to the facts of the present case, it is apparent that both the Election Tribunal as well as the appellate court fell into error in holding that just because the caste “Dakua Paika” does not appear in Ext. 15, the petitioner cannot be held to be belonging to OBC. As already stated above, this Court in W.P. (C) No. 3404 of 2008, while dealing with the question of grant of a certificate that the petitioner belongs to OBC while quashing the impugned orders passed by the Tahasildar as well as the Sub-Collector, categorically held that issuance of caste certificate or cancellation of the same will not affect the election dispute pending before the Tribunal and it would be open for the court concerned to decide the election dispute on the basis of the evidence adduced before it. However, on perusal of the evidence adduced before the Election Tribunal, it appears that none of the parties have adduced any evidence as to whether the petitioner belongs to OBC or not bereft of Ext. 15.

14. In view of the law as settled, it is clear that unlike the Presidential Order of 1950 with regard to Scheduled Caste and Scheduled Tribe, the court can appreciate the materials brought

before it, in order to find out as to whether a person belongs to OBC or not, as the said question cannot be confined to only caste to which a person belongs.

15. In view of the above analysis, it is inevitable to remit the matter back to the learned Election Tribunal to rehear the case by giving opportunity to the parties to adduce further evidence. The learned Election Tribunal on recording such evidence shall appreciate and analyze the same so as to arrive at a finding as to whether the petitioner belongs to OBC or not and shall pass a fresh judgment. Both the impugned judgments of the learned Election Tribunal as well as the appellate court are accordingly set aside and the matter is remitted back for being reheard as directed above. Since the case is long pending, the learned Election Tribunal is directed to dispose of the case finally within a period of six months from the date of communication of this order. For the above purpose, it shall issue fresh notice to the election petitioner as well as the opp. Parties in the election dispute and proceed thereupon in accordance with law as directed above.

As the judgments of the courts below are set aside and the election petition is relegated to the position, when it was ready for hearing, the petitioner is entitled to continue as the

elected Sarpanch of the Grama Panchayat, as if, her election has not been annulled, till final disposal of the election dispute.

16. With the aforesaid observations and directions, the writ petition is disposed of.

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M. M. Das, J.

Orissa High Court, Cuttack.
August 21st , 2009/Biswal.